# Petition

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No. 81-728

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

PRICE BROTHERS COMPANY,

Petitioner,

v.

PHILADELPHIA GEAR CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1.

Did the Sixth Circuit abuse its discretion when it reversed the Decision of the trial court, without remand, substituting its view of the facts in the place of the trial court?

(a) Is the Decision of the Sixth Circuit below in direct conflict with *Zenith Corp.* v. *Hazeltine,* 395 U.S. 100 (1969)?

(b) Was the Petitioner deprived of a fair and impartial review by the Sixth Circuit due to the alleged misconduct of the trial court?

2.

Did the Sixth Circuit create substantive federal law when it gave an erroneous interpretation, construction and application of and to the *Uniform Commercial Code*?

## LIST OF PARTIES

Pursuant to Rule 21.1 (b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a listing of the parties below and subsidiaries of Petitioner which are not wholly owned:

1. Philadelphia Gear Corporation
   King of Prussia, Pennsylvania

2. Price Brothers Company
   367 West Second Street
   Dayton, Ohio 45402

3. Price Brothers Independent Concrete Pipe Company
   Box 8645
   St. Louis, Missouri

4. Hope – Corguard, Inc.
   P.O. Box Drawer B
   Building 19
   Green Grove Springs, Florida 32043

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PRICE BROTHERS COMPANY,

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Sixth Circuit entered on May 15, 1980.

## OPINIONS BELOW

The Decision of United States Court of Appeals, for the Sixth Circuit of May 15, 1981. Officially cited as *Price Brothers Company* v. *Philadelphia Gear Corporation*, 649 F.2d 416 (1981), and as printed in APPENDIX A.

The Decision of United States Court of Appeals, for the Sixth Circuit of September 5, 1980. Officially cited as *Price Brothers Company* v. *Philadelphia Gear Corporation*, 629 F.2d 444 (1980), and as printed in APPENDIX A.

Unreported *Findings of Fact* and *Conclusions of Law and Judgment* of the United States District Court, Southern District of Ohio, dated October 25, 1977 and as printed in APPENDIX A.

## JURISDICTIONAL STATEMENT

Petitioner seeks review of the Judgment of the United States Court of Appeals, Sixth Circuit, decided and entered on May 15, 1981. Upon timely motion, rehearing was denied on June 18, 1981. On September 17, 1981, Justice Byron R. White issued an Order extending the time to file a Petition for a Writ of Certiorari up to and including October 15, 1981.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254.

## RULES AND STATUTES INVOLVED

RULE 52, *FEDERAL RULES OF CIVIL PROCEDURE* (APPENDIX B)

*Ohio Revised Code*, SECTION 1302.26 (UCC 2-313), Express warranties by affirmation, promise, description, sample. (APPENDIX B)

*Ohio Revised Code*, SECTION 1302.27 (UCC 2-314), Implied warranty; merchantability; usage of trade. (APPENDIX B)

*Ohio Revised Code*, SECTION 1302.28 (UCC 2-315),

Implied warranty; fitness for particular purpose. (APPENDIX B)

*Ohio Revised Code*, SECTION 1302.30 (UCC 2-317), Cumulation and conflict of warranties express or implied. (APPENDIX B)

## STATEMENT OF THE CASE

Plaintiff, Price Brothers Company, is a Michigan Corporation with its principal place of business in Dayton, Ohio. The Corporation is a manufacturer of concrete pipe. Defendant, Philadelphia Gear Corporation, is a Pennsylvania Corporation with its principal place of business in King of Prussia, Pennsylvania. Philadelphia Gear Corporation manufactures industrial gears, clutches, and power transmission equipment.

Plaintiff, Price Brothers Company, brought an action against Philadelphia Gear Corporation claiming breach of contractual specifications, breach of express warranties, and breaches of the implied warranties of merchantability and fitness for purpose, claiming money damages in the amount of $443,280.14.

Jurisdiction of the trial court was invoked under 28 U.S.C. § 1332. Venue was predicated upon 28 U.S.C. § 1391 (a). Trial began on March 8, 1976 and it was not until October 25, 1977, that the Court rendered its findings of fact and conclusions of law and entered final judgment in favor of Price Brothers Company for $125,-864.15. Philadelphia Gear Corporation appealed to the Sixth Circuit. Price Brothers Company cross-appealed.

Price Brothers Company manufactures pressure pipe used for the transmission of water and other fluids under vary-

ing high and low pressures which require special reinforcing of the pipe to maintain its integrity. The pipe varies in sizes from sixteen inches to one hundred forty-four inches in diameter, and consists of a steel cylinder, an inner concrete core which is applied to the inside of the steel cylinder, and steel wire of various gauges which is wrapped around the outside of the steel cylinder using high tension. Then, a thin coating of concrete is placed on the outside, completely covering the outer portion of the pipe. The process of wrapping the wire around the steel cylinder under tension is performed by a "wrapping machine".

In late 1969 or early 1970 Price Brothers Company began the process of ordering long lead items for the construction of a new wrapping machine. Since Price Brothers Company had constructed several wrapping machines prior to this, it had intended to use the same design in construction it had used on prior wrapping machines.

However, Philadelphia Gear Corporation published an article extolling the virtues of its "Synchrodrive units". It claimed they had limitless life, infinitely variable speeds, would replace existing drives of competitors, with a design that was free from wear and tear, and had numerous industrial uses. Discussions took place between Price Brothers Company and Philadelphia Gear Corporation concerning the application of the Philadelphia Gear Corporation units in the Price Brothers Company wrapping machine. Price Brothers Company was advised that Philadelphia Gear Corporation could meet Price Brothers Company's requirements for the wrapping machine and forwarded to Price Brothers Company sales brochures and a general manual along with advice that Price Brothers Company would be contacted by its local agent. The brochures and manuals stated that the units had limitless life, infinitely

variable speeds, durable clutches, extremely fast response time, disc packs with design life of 25,000 hours, and the like. Of significance, Philadelphia Gear Corporation also represented that it became involved in all phases of the customer's systems and applications.

Shortly thereafter, Price Brothers Company was contacted by a sales representative for Philadelphia Gear Corporation who testified that his job was to find out the customer's needs and determine whether the product could meet those needs and requirements. The representative was fully aware of the particular application demanded and transmited this information to Philadelphia Gear Corporation. Philadelphia Gear Corporation and its representatives claim that its two drive units were superior to the type of units then being used by Price Brothers Company. This was confirmed by several Philadelphia Gear Corporation engineers including its chief applications engineer. The chief engineer for Philadelphia Gear Corporation stated that an applications engineer's job is to determine whether or not a particular synchrodrive is compatible with the customer's application. Price Brothers Company relied upon the representations of durability and performance of the synchrodrive units.

Philadelphia Gear Corporation promised a delivery date of November 15, 1970, for the two synchrodrive units. They were not delivered until July of 1971. One of the synchrodrive units was immediately recalled by Philadelphia Gear Corporation due to design errors and was redelivered in November of 1971. The Philadelphia Gear Corporation units did not work. After start-up of the wrapping machine, the cooling system on the units failed, the speed could not be controlled due to design errors, the braking system had to be replaced, the clutch plates fell apart, the controls had to be redesigned, and other prob-

lems with the units which are material but too numerous to discuss at this time. Philadelphia Gear Corporation's chief engineer best described the performance of its synchrodrive units in the wrapping machine by stating:

> "We, for example, would find that things worked beautifully in the laboratory, and on the basis of that we developed the confidence to sell such systems to customers, and yet when the customer applied it, all hell broke loose."

Unrefuted testimony established that Philadephia Gear Corporation knew and concealed from Price Brothers Company that its product was in the developmental stage and had never been used in a production line. Unknown to Price Brothers Company at the time was the fact that Philadelphia Gear Corporation had just begun its research and development and had never successfully marketed a unit similar to those sold to Price Brothers Company. The documents obtained through discovery and presented during the trial established that Philadelphia Gear Corporation referred to its units as "prototypes" and that it was still on a "learning curve" at the time of sale to Price Brothers Company. Philadelphia Gear Corporation's chief engineer admitted his misrepresentations:

> "Almost all of my remarks, therefore, were based on our laboratory experience, and usually I might summarize it by saying that the hard facts of field experience proved some of my statements to be overly optimistic."

As a result of the delivery delays, and the failure of the machines to perform pursuant to the contractual specifications and express and implied wararnties, Price Brothers Company was subjected to huge expenditures for purchasing pipe from a competitor, additional shipping costs,

and additional engineering expenses. One Philadelphia Gear Corporation unit had to be completely removed from the wrapping machine and the other was substantially modified.

## REASONS FOR GRANTING THE WRIT

### A. INTRODUCTION

Petitioner submits that the Sixth Circuit Decision is contrary to the Decisions of the Supreme Court, contrary to Rule 52, *Federal Rules of Civil Procedure,* and contrary to the provisions of the *Uniform Commercial Code* which has been adopted by the various States, including Ohio. Consideration by the Supreme Court is necessary to secure, maintain, and enforce adherence to its Decisions throughout the United States and to assure uniformity of its Decisions.

This is a case wherein the Appellate Court substituted its Judgment for that of the trial court. The case involves a situation in which Petitioner was penalized because of the alleged misconduct of the trial judge which so influenced the minds of the Appellate Justices as to prevent Petitioner from receiving a fair and impartial review on appeal (Appendix Page 1a). The result was a reversal without remand. The Appellate Court gave lip service to this Court's prior decisions pertaining to the "clearly erroneous rule" but ignored the directive of those decisions.

The obvious agitation of the Appellate Court resulted in an erroneous interpretation, construction and application of the *Uniform Commercial Code* which has been adopted nationwide. The Court's interpretation of the *Uniform Commercial Code* reverts to the old theory of "caveat

emptor" in business relationships between merchants. The appellate decision condones lies and misrepresentations by a seller when it states that a buyer should recognize a seller's "falsehoods" and should thereby prevent them from being the basis of the bargain (Appendix Pages 10a-11a). The trial court found the evidence "unrefuted" that Respondent knowingly misrepresented the capabilities of the product (Appendix Page 30a). The Court of Appeals "creates" federal law where none exists. It misconstrues and misapplies existing Ohio law when it places upon the buyer the burden of sifting out falsehoods known to the seller but not the buyer. The Court places an unreasonable burden upon the buyer to become an expert in the design and manufacture of a seller's product. Presumably, sellers can now prey upon unwary buyers with impunity and sell them defective goods.

The Sixth Circuit chose to interpret the facts in a light most favorable to Respondent even though the trial transcript does not come close to supporting such an interpretation. The Sixth Circuit has departed from the accepted and usual course of judicial proceedings and this requires the Supreme Court to exercise its powers of supervision over an inferior Court. Furthermore, this Court cannot countenance and leave unchecked a *de novo* Decision by the Appellate Court. The Decision creates a dangerous precedent, has a national impact, and is unfair to this Petitioner. Therefore, Petitioner respectfully requests the Supreme Court to allow the Writ.

B.

## THE DECISION OF THE SIXTH CIRCUIT WITH RESPECT TO SUBSTITUTING ITS VIEW OF THE FACTS IN THE PLACE OF THE TRIAL COURT IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 52, Federal Rules of Civil Procedure, provides among other things:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

Design, motive, falsehoods, representations and the like depend peculiarly upon the credit given to witnesses by those who see and hear the witness. The trial court has the unique opportunity to listen to and observe the witnesses and determine if they spoke the truth. The Appellate Court's Decision amounts to a trial *de novo* when it decided to substitute its judgment of the facts in the place of the trial court. Perhaps, the trier of facts could have reached a different conclusion. However, a choice between two permissible views of the evidence is not clearly erroneous. For example, the Appllate Court made the following factual findings:

(a) That Price Brothers Company is in at least as good a position as Philadelphia Gear Corporation to judge whether the Philadelphia Gear Corporation components would meet the Purchase Order specifications (Appendix Page 10a).

(b) That Price Brothers Company did not contend

that the product did not meet the specifications (Appendix Page 10a).

(c) That Price Brothers Company should have recognized the error of Philadelphia Gear Corporation as either puffing or falsehood (Appendix Page 10a)

(d) That Price Brothers Company should have determined themselves the adequacy of the proposed components (Appendix Page 10a).

(e) That Price Brothers Company remained silent knowing that the Philadephia Gear Corporation units would not perform (Appendix Pages 10a-11a).

(f) That Price Brothers Company did not rely upon the representations of Philadelphia Gear Corporation in selecting the components (Appendix Page 11a).

The above facts especially depend upon credibility assessment of witnesses by those who see and hear them, and the Appellate Court, equipped with only a cold record, cannot substitute its judgment. On appeals in actions tried by the District Court without a jury, the Court of Appeals does not have the power to review the evidence in the record and supply the findings of fact necessary to substitute its judgment for that of the trial court.

This Court most recently reaffirmed the standard of Rule 52(a) in *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 123 (1969), where it cautioned:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circum-

> scribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence."

The testimony during the course of the trial was in sharp conflict, not only as to what formed the "basis of the bargain" but also as to whether or not the machines performed as represented. The trial court resolved these conflicts in favor of Price Brothers Company. The Appellate Court resolved conflicts in favor of Philadelphia Gear Corporation. A choice between two permissible views of the weight of the evidence is not clearly erroneous. *United States* v. *Yellow Cab,* 338 U.S. 338, 342 (1949).

The Appellate Court has departed from the standard set by this Court and has gone so far as to deprive the Petitioner of a retrial.

## C.

## THE COURT OF APPEALS CANNOT CREATE AND APPLY AN ERRONEOUS BODY OF SUBSTANTIVE FEDERAL LAW TO REVERSE, WITHOUT REMAND, FACTUAL FINDINGS AND THE JUDGMENT OF THE TRIAL COURT IN AN ACTION WHICH IS GOVERNED BY THE SALES ARTICLE OF OHIO'S UNIFORM COMMERCIAL CODE.

### 1. Express Warranties Under UCC.

After determining that the *Ohio Uniform Commercial Code* was applicable to this action, the Court of Appeals proceeded to apply to this case a body of law which was contrary to that embodied in the UCC. While Petitioner does agree that the Sales Article of the *Ohio Uniform Commercial Code* does apply here, it strongly disputes that such

law was, in fact, applied by the Court of Appeals when it reversed, without remand, the judgment of the Trial Court.

The Court of Appeals applied law other than Ohio's when it decided that the Philadelphia Gear Corporation journal article, sales literature, technical manuals, and assurances of their sales representatives did not form a part of the basis of the bargain in this transaction. The law of Ohio is clear and the Trial Court found, that all of these pre-purchase order communications and contacts emanating from Philadelphia Gear Corporation did form a part of the basis of the bargain. The Trial Court specifically found that Petitioner abandoned an alternate design for its pipe wrapping machine after it became aware of Philadelphia Gear Corporation's article in Products Engineering regarding its Synchrodrive. (Appendix Page 25a, Finding of Fact 7.) The Trial Court additionally found that the parties discussed the use of the synchrodrive with a confirming letter by Philadelphia Gear Corporation. Also some sales literature and manuals descriptive of the synchrodrives were sent by Philadelphia Gear Corporation to Petitioner. (Appendix Page 26a, Finding of Fact 8.) Further discussions ensued through Philadelphia Gear Corporation's local sales representative who, the Court found, "informed Plaintiff that model H-29 Synchrodrive could be used in place of the differential gear in the pipe wrapping machine". Following this assurance, Price Brothers Company decided to purchase the H-29. (Appendix Page 26a, Finding of Fact 9.)

The Trial Court also found that Philadelphia Gear Corporation sought to sell another synchrodrive to Petitioner as the drive component of the pipe wrapping machine. The Trial Court specifically noted that Philadephia Gear "gave assurances that the model H-12 Synchrodrive with

an internal brake could perform as well as the Eddy Current drive and at a lower price". Following these assurances, Price Brothers Company decided to purchase the Model H-12. (Appendix Page 26a, Finding of Fact 10.)

The Trial Court also made the specific finding that "neither the H-12 nor the H-29 ever performed as represented". (Appendix Page 27a, Finding of Fact 12.)

Although it did not use the words "basis of bargain", the Trial Court undoubtedly determined that the journal article, sales literature and manuals, and assurances from sales representatives did form part of the basis of the bargain here. Review of applicable Ohio law discloses that the Trial Court correctly applied the law of Ohio to these facts while the Court of Appeals manufactured its own version of sales law which is not in accord with the law of Ohio.

The concept of "basis of bargain" is integral to the creation of express warranties under the *Uniform Commercial Code*. Express warranties are described and defined at § 1302.26 (UCC 2-313), *Ohio Revised Code*. Of particular application to this case is the following portion of § 1302.26:

> "(A) Express warranties by the seller are created as follows:
>
> (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. . . ."

The application of the "basis of bargain" concept is dealt with in the *Official Comments* to this section of the *Uniform Commercial Code. Comment 3* provides in pertinent part as follows:

> "In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact."

The subject is further discussed at *Official Comment 6* which states, again, in part:

> "In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact."

*Official Comment 8* poses the question of what statements become part of the basis of the bargain and answers that question:

> "What statements of the seller have in these circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of these statements of the seller do so unless good reason is shown to the contrary."

Thus, the statutory language itself as well as the *Official Comments* describe and apply the "basis of bargain" concept.

Ohio case law has also spoken on the subject. In *Society National Bank* v. *Pemberton,* 63 Ohio Misc. 26, 409 N.E. 2d 1073 (Akron Mun. Ct. 1979), the Court deter-

mined that oral representations of a truck salesman that the truck "would be just right for the purpose of commercial snow plowing" formed a part of the basis of the bargain and thereby created an express wararnty. The express warranty survived a disclaimer of all warranties set forth in the written contract between the parties, the Court reasoning as follows:

> "Once made, any fact which is to take such affirmations out of the parties' agreement requires clear affirmative proof . . . In the instant case, however, express warranties were given as to the condition and performance ability of the subject matter of the sales agreement. These are in addition to those warranties implied by law, and are not so easily withdrawn from the parties' agreement."

This Ohio decision is in conformity with the *Ohio Uniform Commercial Code* and contains no reliance requirement.

The Court of Appeals, however, in reversing the Trial Court, applied the antiquated reliance standard which has no place in the *Ohio Uniform Commercial Code*. As noted above, there is no reliance requirement set forth in UCC 2-313, which deals with the creation of express warranties. Moreover, the Official Comments, and most notably, *Official Comment 3*, specifically declares that "no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement". In fact, the Comment continues, there must be clear affirmative proof to take any such affirmation out of the agreement, once it is in. *Society National Bank, supra.*

That reliance is an outdated concept under the UCC, as evidenced by *Official Comment 3*, is demonstrated by the case law of jurisdictions other than Ohio. *Community Television Services, Ins.* v. *Dresser Industries, Inc.*, 586 F. 2d 637 (8th Cir. 1978), *Gladden* v. *Cadillac Motor Car*

*Division*, 83 N.J. 320, 416 A. 2d 394 (1980), *Hawkins Construction Co.* v. *Matthews Co., Inc.*, 190 Neb. 546, 209 N.W. 2d 643 (1973), *Ewers* v. *Eisenzopf*, 88 Wis. 2d 482, 276 N.W. 2d 802 (1979), *Brunner* v. *Jensen*, 215 Kan. 416, 524 P. 2d 1175 (1974), *Winston Industries, Inc.* v. *Stuyvesant Insurance Co., Inc.*, 317 So. 2d 493 (Ala. Ct. App. 1975), *Interco Inc.* v. *Randustrial Corp.*, 533 S.W. 2d 257 (Mo. Ct. App. 1976), *Automated Controls, Inc.* v. *MIC Enterprises, Inc.*, 27 UCC Reporting Service 661 (D. Neb. 1978), aff'd, 599 F. 2d 288 (8th Cir. 1979), and *Indust-Ri-Chem Laboratory, Inc.* v. *Par-Pak Co., Inc.*, 602 S.W. 2d 282 (Tex. Ct. App. 1980).

Yet, the Court of Appeals did utilize a reliance standard and premised its reversal on such standard. In its decision, the Court considered whether the pre-purchase order communications and contacts from and with Philadelphia Gear Corporation should be considered as part of the basis of the bargain. In determining whether they were, the Court decided it should consider, among other things, "the reliance placed on the seller's statements by the buyer". (Appendix Page 9a.) The Court then proceeded to determine that because certain performance specifications were set out in the Petitioner's purchase order, such "specificity is antithetical to any finding that Price Brothers Company relied on non-specific, precontract statements . . ." In concluding its discussion of "basis of the bargain" the Court reasoned that "it would stretch reason beyond its limits to find that the buyer relied on verbal assurances by salesmen and writings intended for unspecified general audiences as part of the basis of the bargain". (Appendix Page 11a.) The Appeals Court, then, applied an erroneous reliance standard which does not exist in *Ohio's Uniform Commercial Code*.

Petitioner submits that even if the reliance standard is

used, that the evidence presented to the Trial Court was certainly sufficient to establish reliance by Petitioner on the pre-purchase order communications and contracts. The Trial Court considered the express warranty issue and decided, upon the facts presented, that an express warranty was created. *Official Comment 3* states that the determination of such an issue is "normally one of fact". The portion of *Official Comment 6* cited above, also states that "there is no escape from the question of fact". The *Ohio Uniform Commercial Code* recognizes, then, that it is a question of fact and the Trial Court having determined that issue, the Court of Appeals should not be permitted to disturb that factual finding by the application of erroneous law. See also *General Supply and Equipment Co., Inc.* v. *Phillips,* 490 S.W. 2d 913, 917 (Tex. Ct. App. 1972) and *Gladden* v. *Cadillac Motor Car Division,* 83 N.J. 320, 416 A. 2d 394 (1980).

By its decision the Court of Appeals extends to Petitioner only those express warranties which are contained in the Petitioner's purchase order and the acknowledgment by Philadelphia Gear Corporation. The Court then decided that there was no contention before it that the Philadelphia Gear Corporation components did not meet the specifications of the purchase order. This conclusion of the Appellate Court is directly contrary to the *Findings of Fact* made by the Trial Court. Furthermore, the Appellate Court's conclusion that only the purchase order express warranties are those extended to Petitioner, also contravenes Ohio law.

Under *Ohio's Uniform Commrecial Code,* a buyer is entitled to have all warranties whether express or implied, construed as consistent with each other and as cumulative, unless such construction is unreasonable. § 1302.30 (UCC 2-317), *Ohio Revised Code.* Petitioner is, therefore, en-

titled to accumulate all express warranties, whether they arise from a journal article, a sales brochure, a technical manual, certain verbal assurances of Philadelphia Gear Corporation, or the contents of the purchase order itself. That express warranties can exist in favor of a buyer although not set forth in the written agreement between the parties is established by *Centennial Insurance Co.* v. *Vic Tanny International of Toledo, Inc.*, 46 Ohio App. 2d 137, 346 N.E. 2d 330 (1975). In *Community Television Services* v. *Dresser Industries*, 586 F. 2d 637 (8th Cir. 1978), the Court accumulated warranties and specifically determined that affirmations contained in the seller's advertising catalog would constitute an express warranty along with the technical specifications set out in the buyer's purchase order for a television broadcasting tower. The Court in *Butcher* v. *Garrett-Enumclaw Co.*, 20 Wash App. 461, 581 P. 2d 1352 (1978), accumulated express warranties with regard to the seller's portable sawmill. The buyer was attracted to the sawmill by the seller's literature and brochures and before issuing a purchase order had received assurances from the seller as to certain of the sawmill's capabilities. These verbal assurances and the representation in the sales literature were coupled with the purchase order contents to provide the buyer with accumulated express warranties which were breached by the seller.

Therefore, the Court of Appeals improperly construed Ohio law with regard to the accumulation of warranties. Petitioner is entitled to accumulate all of the pre-purchase order express warranties with those actually contained in the purchase order itself and to recover against Philadelphia Gear Corporation for the breach of any such warranties.

The Appellate Court ultimately determined that Petitioner was on "equal footing" with Philadelphia Gear Corporation relative to the subject matter of this transac-

tion and, as a result, the falsehoods and misrepresentations of Philadelphia Gear Corporation could not constitute the basis of the bargain between the parties. This conclusion is in direct contrast with the concept of the basis of the bargain as set forth in the statute and the accompanying official comments. Moreover, other Courts have considered cases in which the seller has failed to properly develop and test his product but, nevertheless, sells it to the buyer with representations and warranties as to its quality and capabilities. In those instances, and in accordance with the provisions of the *Uniform Commercial Code*, these Courts have found breaches of express warranty on the part of the seller. See *Butcher* v. *Garrett-Enumclaw Co.*, 20 Wash. App. 361, 581 P. 2d 1352 (1978), wherein the Court determined that although the buyer had considerable training and background in the manufacture and operation of sawmills, the seller's portable sawmill was a very unique machine which simply had not been properly tested, was actually a prototype, and was a "very unique machine" about which the seller, and not the buyer, was the expert. *Indust-Ri-Chem Laboratory, Inc.* v. *Par-Pak Co., Inc.*, 602 S.W. 2d 282, 290, 292, 293 (Tex. Ct. App. 1980), held that absent facts placing the buyer on notice that there was a particular defect in the warranted item, the buyer was entitled to rely upon the express warranty by sample.

*Automated Controls, Inc.* v. *MIC Enterprises, Inc.*, 27 UCC Reporting Service 661 (D.Neb. 1978), dealt with the purchase of the seller's solid state electronic control boxes for use on pivot irrigation machinery distributed by the buyer. The buyer had previously used a different control device for its irrigation machinery but, based upon express warranties as to the capabilities of the seller's electronic control box, the buyer decided to use the electronic box as a replacement control component. The Court therein

determined that the seller was the specialist in the design of this type of control system and was responsible under an express warranty for the failure of the electronic control box to work properly, notwithstanding that buyer had earlier marketed the irrigation system with a different type of control box. The Court in *Interco, Inc.* v. *Randustrial Corp.*, 533 S.W. 2d 257 (Mo. Ct. App. 1976), decided that a buyer had no obligation to test a product purchased from the seller when the purchase was based upon representations contained in seller's catalog, which catalog contained no testing requirement.

### 2. Implied warranties under the UCC.

The Court of Appeals has also misconstrued the law of Ohio as it relates to the creation and application of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

The implied warranty of merchantability is dealt with at Section 1302.27 (UCC 2-314), *Ohio Revised Code,* which states that unless it is excluded or modified, a warranty is implied that the "goods shall be merchantable". To be "merchantable", the goods must at least be such as "are fit for the ordinary purposes for which such goods are used". The trial court expressly determined that the implied warranty of merchantability was given by Philadelphia Gear Corporation to Petitioner and that it was breached. The Court of Appeals, however, decided that there was no implied warranty of merchantability because Philadelphia Gear Corporation's product was a new one and, therefore, there was no standard by which it could be judged to be "generally acceptable in the trade for goods of that kind". Such a conclusion is to state that whenever there is a new product, no implied warranty of merchantability exists.

This is not the law of Ohio and, in the absence of a proper exclusion or modification, the implied warranty of merchantability by law accompanies a product into the hands of the purchaser. The Court of Appeals did not find that there had been such an exclusion or modification, but decided nevertheless that the warranty did not exist here.

Petitioner was also entitled to the implied warranty of fitness for a particular purpose with regard to the components purchased from Philadelphia Gear Corporation. The Court of Appeals, again, decided otherwise because of the "degree of specificity of Price Brothers Company's purchase order and Price Brothers Company's own undisputed high degree of knowledge regarding the mechanical requirements of its pipe wrapping machine". The Appellate Court again ignores the factual findings of the Trial Court that there was a breach of this warranty. In arriving at its conclusion, the Appeals Court disregards existing Ohio law.

Section 1302.28 (UCC 2-315), *Ohio Revised Code*, creates and defines the implied warranty of fitness for a particular purpose. The creation of such a warranty exists in the seller's knowledge at the time of contracting of the buyer's particular purpose for the item and the buyer's reliance on the seller's skill or judgment. This warranty exists unless it is excluded or modified. The Court of Appeals found no exclusion or modification and decided, contrary to the findings of the Trial Court, that Petitioner did not rely upon the expertise of Philadelphia Gear Corporation. While Price Brothers Company had some expertise with regard to wrapping machines, it had no knowledge whatsoever regarding the Synchrodrive touted by Philadelphia Gear Corporation.

*Slemmons* v. *Ciba-Geigy Corp.*, 57 Ohio App. 2d 43, 52, 385 N.E. 2d 298 (1978), dealt with the issue of relative

knowledge of buyer and seller with regard to the implied warranty of fitness for a particular purpose. This case involved a farmer's claim that a herbicide purchased from a local farm bureau did not properly function to control the weeds in the farmer's crop fields. The Court therein stated:

> "To the degree that the crop loss resulted from the negligence of Plaintiff, and not from the breach of warranty, Plaintiff could not, of course, recover. Regardless of Plaintiff's expertise or his understanding of his problem, which included the heavy 1973 applications of herbicide to the fifty acre tract and his desire to rotate to beans in 1975, Plaintiff had a right to rely on Farm Bureau to furnish him goods fit for the purpose and, knowing of the purpose and that Plaintiff was relying on its skill or judgment, by proceeding to furnish the tank spray of the herbicide mix which it did, Farm Bureau contractually exposed itself to the implied wararnty set forth in the statute."

Philadelphia Gear Corporation knew of Petitioner's purpose for the components and, in fact, helped prepare the purchase order specifications for the purchase order sent to Philadelphia Gear Corporation. The Trial Court found reliance upon the knowledge, skill, and expertise of Philadelphia Gear Corporation and, when combined with Philadelphia Gear Corporation's knowledge of the purpose for which the components were to be used, an implied warranty of fitness for a particular purpose was created.

## CONCLUSION

Under these circumstances, this Court should do simple justice by granting the Petition for Writ of Certiorari and reverse the decision of the Sixth Circuit or, in the alternative, reverse and remand for a new trial.

NEIL F. FREUND
Attorney for Petitioner

OF COUNSEL:

RICHARD H. ROGERS
Price Brothers Company

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## APPENDIX A

## OPINIONS BELOW

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**Nos. 78-3088 and 78-3089**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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| PRICE BROTHERS COMPANY,<br>*Plaintiff-Appellee*<br>*Cross-Appellant,*<br>v.<br>PHILADELPHIA GEAR CORPORATION,<br>*Defendant-Appellant*<br>*Cross-Appellee.* | APPEAL from the United States District Court for the Southern District of Ohio, Western Division. |

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Decided and Filed May 15, 1981.

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Before: KEITH and MERRITT, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined. MERRITT, Circuit Judge, (p. 14) filed a separate concurring opinion.

PECK, Senior Circuit Judge. This is an appeal from a judgment entered in a diversity action for breach of con-

tract and breach of warranties. Plaintiff Price Brothers Company, a manufacturer of reinforced concrete pipe, brought an action against Philadelphia Gear Corporation, claiming that machine components produced by the defendant and used in Price Brothers' pipe wrapping machine had failed to perform as represented. At the conclusion of a trial to the bench, the district court entered judgment for the plaintiff and awarded $125,864.15 in damages. The defendant appealed both the conclusion as to liability and the award of damages, and the plaintiff cross-appealed, asserting that the damage award was inadequate.

## I.

Among the issues raised by Philadelphia Gear's appeal is as assertion that the trial court relied on information outside the record in reaching its decision. As one basis of this contention, Philadelphia Gear alleged that prior to the trial the trial judge's law clerk had traveled from Dayton, Ohio, to Beacon, New York, and had observed the operation of the pipe wrapping machine that is at the center of this controversy. Philadelphia Gear argued that the law clerk's observations were presumably reported to the trial judge, and speculated that this report may have been relied on by the judge in making his findings. Philadelphia Gear asserted that it had no knowledge of the clerk's trip prior to its occurrence, that it therefore had no opportunity to be present when the clerk observed the machine, and that it had no opportunity to review or rebut any report made by the clerk to the judge. Philadelphia Gear argues that the fact finding potentially based on the nonevidentiary observation by the law clerk is clearly erroneous as a matter of law.

Philadelphia Gear first raised the issue of the law clerk's off-the-record involvement by a motion made after entry

of judgment, pursuant to Fed. R. Civ. Pro. 59 (c), asking the court to amend its findings to reflect the fact of the law clerk's visit. The district judge denied that motion without comment on the law clerk's involvement. With the record in the state just described, serious questions regarding the impartiality of the fact finding were necessarily noted by this Court on appeal. *Price Bros. Co.* v. *Philadelphia Gear Corp.*, 629 F.2d 444 (6th Cir. 1980).

It is imperative that a finder of fact avoid off-the-record contacts that might bias its judgment or otherwise impair its ability to fairly and objectively weigh the evidence properly submitted at trial. A judge presiding at a bench trial may not directly or indirectly, through his law clerk or by any other means, conduct an investigation outside the record and use the results of that investigation in determining the facts of a case. It need hardly be mentioned that what a judge cannot do in person he may not do by proxy. The fact that the clerk rather than the judge made the trip and observed the machine in no way alters the problem. The fair and impartial administration of justice demands that facts be determined only upon the evidence properly presented on the record. Furthermore, it is incumbent on the finder of fact to protect the appearance, as well as the fact, or its impartiality. It is fundamental that no judgment can be maintained under circumstances that suggest that the fact finder may have relied on covert, personal knowledge rather than on the evidence produced in open court and subject to review by the parties, the public. and the appellate court.

A view by the fact finder of places or objects related to a lawsuit does not *per se* destroy the fact finder's impartiality. Where the purpose of a view is to assist the fact finder to better understand evidence properly introduced, and the view itself is not considered as evidence, then the

potential for prejudice to a party not present at the view is minimized. In contrast, where the fact finder's observations upon a view are used as evidence to determine the facts, then the procedural safeguards of a trial, including the rules of evidence and the participation of the parties must apply.

Unfortunately, from the record originally presented to this Court it could not be determined if the trial judge's law clerk had observed the pipe wrapping machine, and if such an observation did occur, how it was used by the trial judge. Accordingly, we remanded for an evidentiary hearing on the questions of whether the law clerk had viewed the machine, what the law clerk reported to the trial judge, when the defendant learned of the view by the clerk, whether the defendant consented to the view, and, most importantly, what use the trial judge made in deciding the case of whatever the law clerk had observed.

On remand, a district judge not previously involved in this case conducted a hearing directed at the questions recited above. Testimony was elicited from the trial judge's law clerk and secretary, attorneys for both parties, and other witnesses. In addition, the trial judge submitted a statement concerning the matters that necessitated the remand.

The undisputed testimony from the hearing answers several of the questions presented. The law clerk did, at the direction of the trial judge, travel to New York and observed the operation of the pipe wrapping machine at the premises of the plaintiff. Counsel for neither party were present. The clerk's conversations with plaintiff's employees were limited to identifying the machine that the clerk had come to see and identifying a part of the machine in response to a question from the clerk.

It is unfortunate that our remand "for an evidentiary hearing and report" (629 F.2d at 447) was interpreted by

the district judge conducting the hearing to mean that no findings of fact were required of him. We are unable, on the basis of the cold record of the hearing, to resolve conflicting testimony as to when the defendant first learned of the law clerk's view of the machine and whether defendant consented to it. Fortunately, however, the questions answered by the undisputed testimony produced at the hearing and by the trial judge's statement do permit us to resolve the issue of whether the trial judge's fact finding was critically impaired by his law clerk's off-the-record observations and report. Thus, whether the defendant consented to the view by the clerk and is thus estopped from asserting prejudice based on that view become irrelevant.

The view involved in this case was more than a simple observation of the place where a specified event was alleged to have occurred. The subject viewed here, the machine, was under the control of the plaintiff. The plaintiff had the opportunity to manipulate what the law clerk saw in order to present an image most favorable to the plaintiff. The defendant was not present to learn what the law clerk observed, what conversations the law clerk had with plaintiff's employees, or what impressions the law clerk conveyed to the trial judge. Obviously, the defendant could not rebut any of the off-the-record information that the trial judge received from this source. These factors created a presumption of prejudice to the defendant in the trial judge's determination of facts that must be rebutted before his decision can stand.

Based on the undisputed testimony produced at the hearing on remand, we conclude that the presumption of prejudice arising from the law clerk's report of off-the-record observations has been overcome. The law clerk's testimony and the statement of the trial judge establish that the sole purpose of the clerk's trip was to observe the

operation of the pipe wrapping machine and describe it to the judge so that he might be better able to understand the evidence to be produced at trial. There is no indication that the trial judge considered the law clerk's report as evidence or that the judge was improperly influenced in his fact finding by the clerk's report. Since the trial judge's fact finding was not based on the off-the-record contact of the clerk's view, any error that may have occurred in not obtaining the parties' consent to that view did not result in prejudice and was harmless. We therefore conclude that the specter of prejudice created by the judge's off-the-record contact with material evidence has been removed, and that the trial judge's findings were not biased by his law clerk's view of the wrapping machine.

## II.

Philadelphia Gear has appealed both the trial court's conclusion that Philadelphia Gear breached express and implied warranties of merchantability and fitness and the court's determination of damages. Price Brothers has also appealed the trial court's damages determination. Because we conclude that the trial court erred in finding that implied and express warranties were breached by Philadelphia Gear, we do not reach the question of damages.

Price brothers had for many years prior to the events of this controversy wrapped concrete pipe with wire by means of complex machinery of Price Brothers' own design. Price Brothers decided to expand its operations to the east coast by constructing a new manufacturing plant at Beacon, New York. During the planning stages for the new plant, a Price Brothers engineer read a journal article describing a new design in disc clutch and drive units manufactured by Philadelphia Gear for commercial applications. Price Brothers' engineer contacted Philadelphia Gear by tele-

phone and discussed the feasibility of replacing certain of the components in Price Brothers' pipe wrapping machine with components manufactured by Philadelphia Gear. Philadelphia Gear provided Price Brothers with sales literature and technical manuals describing the Philadelphia Gear components and arranged for a contact between Price Brothers and Philadelphia Gear's local sales representative in Price Brothers' area. Price Brothers' engineers had subsequent discussions with Philadelphia Gear's sales representatives regarding the possible use of certain Philadelphia Gear components in Price Brothers' new machine. Price Brothers ultimately decided to purchase two components from Philadelphia Gear for use in the pipe wrapping machine that was to be constructed in the new plant. Price Brothers submitted a purchase order to Philadelphia Gear specifying certain performance characteristics of the components ordered, and Philadelphia Gear accepted this order by acknowledgment. After Price Brothers' new plant was completed, Price Brothers experienced difficulty with its pipe wrapping machine. Price Brothers attributed these problems to an alleged failure of the Philadelphia Gear components to perform as warranted.[1]

The trial court's conclusion that Philadelphia Gear, ". . . breached both express and implied warranties of merchantability and fitness for a particular purpose," is based on its finding that Philadelphia Gear misrepresented how the components would perform once installed in Price Brothers' much larger and more complex wrapping

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[1] Since the contract for the sale of Philadelphia Gear's components to Price Brothers was a transaction in goods bearing a reasonable relationship to the forum state of Ohio, the Ohio Uniform Commercial Code is applicable to questions of sales warranties. OHIO REV. CODE ANN. § 1301.05 (Page).

machine. The trial court found that one instance of this misrepresentation was a journal article describing Philadelphia Gear's new design for the components in question. That article was published before Philadelphia Gear was first contacted by Price Brothers. Additionally, the trial court found that Philadelphia Gear's sales literature and technical manuals, as well as verbal assurances by Philadelphia Gear's sales representatives concerning the use of the components in Price Brothers' machinery, also overstate the capabilities of the Philadelphia Gear components in Price Brothers' application. These misrepresentations each occurred prior to any sales agreement between the parties. Subsequent to these events, Price Brothers tendered a purchase order to Philadelphia Gear. That order contained specifications of performance characteristics, apparently arrived at with Philadelphia Gear's assistance, for each of the two components that Price Brothers offered to purchase from Philadelphia Gear. Philadelphia Gear's acceptance repeated these specifications.

Express warranties under the Ohio Uniform Commercial Code (UCC) are contractual in nature. They arise only where a promise by the seller or a description of the goods to be sold is made a part of the basis of the parties' bargain. OHIO REV. ANN. § 1302.26 (Page). The trial court made no express findings that the journal article, sales literature, or the sales representatives' assurances were made a basis of the bargain of the parties. However, the court's conclusion that Philadelphia Gear breached express warranties because these statements were inaccurate implies a finding that these statements were in fact a part of the parties' bargain. As a finding of fact, this Court will not set aside a determination that the journal article, sales literature, or sales representatives' assurance was a basis of the bargain unless that finding is clearly erroneous.

The entire written contract of the parties in this case

consists of Price Brothers' purchase order and Philadelphia Gear's acknowledgment. Nothing in these documents incorporates the journal article, sales literature, or sales representatives' assurances in the written agreement. The UCC does not require that express warranties be made a part of the written agreement of the parties, and express warranties may be be added by proof of oral warranties so long as the writing is not itself a complete integration of the agreement. *Centennial Ins. Co.* v. *Vic Tanny International,* 46 Ohio App. 2d 137, 346 N.E.2d 330, 336 (1975). However, any statements not incorporated in the written sales agreement must be shown to be a part of the bargain of the parties before they can be recognized as express warranties. In order to determine whether the pre-contract statements of Philadelphia Gear were in fact a basis of the bargain and thus an express warranty, or whether they were merely a seller's "puffing."[2] the court should consider the circumstances surrounding the transaction, the reasonableness of the buyer in believing the seller, and the reliance placed on the seller's statements by the buyer. 1 A. SQUILLANTE & J. FONSECA, THE LAW OF MODERN COMMERCIAL PRACTICES 236, § 3:40 (revised ed. 1980). On the record of this case before this Court, which adequately documents the sales transaction, any finding that Philadelphia Gear's journal article, sales literature, or its sales representatives' assurance was a basis of the bargain must leave this Court with a ". . . definite and firm conviction that a mistake has been committed," and that the finding is therefore erroneous. *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948).

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[2] "Puffing" is recognized by the UCC express warranty section, OHIO REV. CODE ANN. § 1302.26(B), which states that the seller's opinion or commendation of the goods does not create a warranty.

The purchase order submitted by Price Brothers to Philadelphia Gear enumerated various performance specifications for each of the two components ordered. These specifications are persuasive indications that Price Brothers carefully considered its needs, albeit with Philadelphia Gear's help, and ordered components with those specific needs in mind. Such specificity is antithetical to any finding that Price Brothers relied on nonspecific, precontract statements in a journal article as a basis for purchasing Philadelphia Gear components.

The representatives of Price Brothers who participated in negotiations with Philadelphia Gear were engineers who were, or should have been, intimately familiar with the complicated pipe wrapping machine designed by Price Brothers in which Philadelphia Gear's components were to be installed. These "'experts" were in at least as good a position as Philadelphia Gear's representatives to judge whether components meeting the purchase order specifications would do the job which Price Brothers intended them to do. There is no contention on this appeal that Philadelphia Gear's components failed to meet the specifications provided by Price Brothers' purchase order. If Philadelphia Gear was in error in its assurances that components meeting the purchase order specifications would perform in a certain manner once installed in Price Brothers' machinery, then Price Brothers' experts should have recognized this error as either "puffing" of falsehood. The expertise of Price Brothers' representatives and their familiarity with the requirements of Price Brothers' pipe wrapping machine enabled them to make an independent assessment of the adequacy of the proposed components for the tasks assigned to them. The obligation of good faith imposed on the parties by OHIO REV. CODE ANN. § 1301.09 (Page) prevents Price Brothers from remaining silent in the face of known overstatements of performance

by Philadelphia Gear and then asserting that those falsehoods were a basis of the bargain. Where both parties to a contract are merchants who are on equal footing with respect to the subject matter of their transactions, and their sales agreement is reduced to a writing that specifies technical requirements for the goods sold, it would stretch reason beyond its limits to find that the buyer relied on verbal assurances by salesmen and writings intended for unspecified general audiences as a part of the basis of the bargain. Consequently, the finding that the precontract sales literature, journal article, and sales representatives' assurances were a basis of the Price Brothers and Philadelphia Gear agreement is clearly erroneous and the trial court's conclusion that Philadelphia Gear breached express warranties must be set aside.

The trial court concluded that Philadelphia Gear had breached implied warranties of merchantability and of fitness for a particular purpose. Under the UCC these warranties arise by operation of law when certain factual circumstances attend a sales transaction. They do not depend on the bargain of the parties for their existence.

The existence of an implied warranty of fitness for a particular purpose is contingent on two general facts. First, the seller must be aware at the time of contracting of a particular purpose for which the buyer intends to use the goods. Second, the buyer must rely on the seller's skill or judgment to select or furnish goods suitable for that particular purpose. OHIO REV. CODE ANN. § 1302.28 (Page) The trial court's conclusion that Philadelphia Gear breached an implied warranty of fitness for a particular purpose must be reversed because of the degree of specificity of Price Brothers' purchase order and Price Brothers' own undisputed high degree of knowledge regarding the mechanical requirements of its own pipe wrapping ma-

chine make any finding that Price Brothers relied on Philadelphia Gear's selection clearly erroneous.

In *Standard Packing Corp.* v. *Continental Distilling Corp.*, 378 F.2d 505 (3rd Cir. 1967), a buyer ordered boxes with acetate wrappers for the purpose of packaging liquor bottles. The seller supplied the boxes according to the purchase order description. When the buyer attempted to insert the boxes into standard shipping cartons, the acetate wrappers were damaged. The buyer contended that the seller was aware of the purpose for the boxes and that the buyer had relied on the seller to supply boxes that would serve that purpose. The court, interpreting § 2-315 of the Uniform Commercial Code (identical to OHIO REV. CODE ANN. § 1302.29 (page)), held that no warranty of fitness for a particular purpose was implied in the parties' transaction because the buyer's reliance was lacking. The court stated that, ". . . where a specific item as delivered fits the description called for by the buyer, there is no breach when the contemplated use of the goods proves inappropriate to their inherent capabilities and design." *Id.* at 508. *In accord, Steel Sanitary Co.* v. *Pangborn Corp.*, 38 Ohio App. 65, 175 N.E.2d 615 (1930) (where contract for manufacture and sale of machinery described in detail, there is no warranty of fitness for use intended); 3 A. SQUILLANTE & J. FONSECA, WILLISTON ON SALES 129, § 19-6 (4th ed. 1974). In the present case Price Brothers ordered components from Philadelphia Gear by use of a purchase order specifying performance criteria. It is of no avail to Price Brothers that Philadelphia Gear may have assisted Price Brothers in arriving at these specifications. The fact that the specifications were jointly arrived at by Price Brothers engineers and Philadelphia Gear representatives only emphasizes the fact that Price Brothers exercised its own judgment in selecting the components

ordered and did not rely on Philadelphia Gear to supply components.

Furthermore, the implied warranty of fitness of UCC § 1302.28 is not readily applicable when the buyer enjoys skill or knowledge equal to that of the seller. Indeed, some courts have concluded that the implied warranty of fitness is unavailable when the skill and knowledge of the buyer is superior to that of the seller. *E.g., Prince* v. *LeVan*, 486 P.2d 959, 969 (Alaska 1971). Price Brothers was well acquainted with its own particular needs, and while Price Brothers might properly seek consultation with Philadelphia Gear regarding Philadelphia Gear's components, it would be unreasonable for Price Brothers to completely defer judgment to Philadelphia Gear to select components for inclusion in Price Brothers' unique equipment. The facts of Price Brothers' knowledge and skill and the specific purchase order make actual reliance by Price Brothers on Philadelphia Gear so unlikely that a finding of such reliance would be clearly erroneous. Therefore, no warranty of fitness for a particular purpose arose from the sales transaction in this case, and the trial court's conclusion that Philadelphia Gear breached such a warranty was error.

The trial court also concluded that Philadelphia Gear breached an implied warranty of merchantability. This warranty is breached when goods are not of an acceptable quality when compared to that generally acceptable in the trade for goods of the kind. OHIO REV. CODE ANN. § 1302.27 (Page) (Official Comment 2).

In the present case the trial court made no finding that Philadelphia Gear components failed to meet the standards for goods of their kind. Indeed, from the record of this case it is difficult to imagine how such a standard of merchantability could have been determined. The previously

referred to journal article describing Philadelphia Gear's designs clearly indicated that the Philadelphia Gear components were of a "new" type in the industry.[3] Where there is ". . . no trade for an experimental machine and no proof or evidence pointing to a record of past years on which a determination of its ordinary purpose could be found, there is no implied warranty created in the instance." 3 A. SQUILLANTE & J. FONSECA, WILLISTON ON SALES 81, § 1809 (4th ed. 1974), citing, *Axion Corp.* v. *G.D.C. Leasing Corp.*, 269 N.E.2d 664 (Mass. 1971).

In the present case, the parties' skill and knowledge in matters relating to their transaction were essentially equal. They contracted for the sale of components to be installed in a highly complex piece of machinery. The components had never before been used in machinery of that type. The specific machinery was itself new and had never been operated with or without the components. In these circumstances no average or usual standards for determining ordinary performance or quality for the components can be determined, and no warranty of merchantability arises from the transaction. Therefore, the trial court's conclusion that Philadelphia Gear breached a warrant of merchantability was error.

For the reasons stated above the judgment of the district court awarding $125,864.15 to Price Brothers is reversed.

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[3] This fact makes Price Brothers' argument that Philadelphia Gear misled Price Brothers regarding the "experimental" nature of the components unpersuasive.

MERRITT, Circuit Judge, concurring. I agree with the Court's holding in Section II. of the opinion that the defendant, Philadelphia Gear, did not breach express and implied warranties and, therefore, agree with the result reached by the Court. I am unable to agree, however, that the evidence in the current record overcomes the "presumption" or "specter" of "prejudice" described so clearly by the Court as arising from the law clerk's unattended efforts to gather and report evidence about the machine to the District Court. Such a unilateral, irregular method of judicial investigation and decision — conducted at the direction of a court without satisfactory notice by a witness who then privately advised the court of his observations, all without cross-examination — turns the rules of evidence upside down and is clearly at odds with our adversary system of justice. A more forceful and conclusive showing is necessary to convince me that this kind of error had no prejudicial effect upon the trial and should, therefore, be disregarded.

Nos. 78-3088 and 3089

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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| PRICE BROTHERS COMPANY,<br>*Plaintiff-Appellee*<br>*Cross-Appellant,*<br>v.<br>PHILADELPHIA GEAR CORPORATION,<br>*Defendant-Appellant*<br>*Cross-Appellee.* | APPEAL from the United States District Court for the Southern District of Ohio, Western Division. |

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Decided and Filed September 5, 1980.

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Before: KEITH and MERRITT, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This is an appeal from a judgment entered in a diversity action for breach of contract and breach of warranties. Plaintiff, Price Brothers Company, a manufacturer of reinforced concrete pipe, brought this suit against Philadelphia Gear Corporation, claiming that machine components produced by the defendant and used in Price Brothers' pipe wrapping machine failed to perform as represented. After the parties' presentation of evidence to the bench on the issues of liability and damages and the receipt of testimony of a

court-appointed expert, the district court entered judgment for the plaintiff and awarded it $125,864.15. The defendant appeals from the finding of liability and award of damages. Plaintiff cross-appeals, asserting that the damage award is inadequate.

Philadelphia Gear raises a number of issues on this appeal. For reasons that will become apparent below, we address only the question of the propriety of the alleged conduct of the trial judge in sending his law clerk to view the subject matter of this litigation.

Following the entry of judgment, the plaintiff filed a motion to alter or amend the judgment, pursuant to Rule 59(c), Fed. R. Civ. P., accompanied by defense counsel's sworn statement that the trial judge's law clerk had traveled to Beacon, New York, prior to trial, and visited the plaintiff's plant where he observed Price Brothers' malfunctioning pipe wrapping machine. Defendant asked the court to amend its findings to reflect the visit. The district judge denied the motion without commenting on whether his clerk had, in fact, made the alleged trip. Philadelphia Gear argues here that the trial court's reliance on evidence outside the record is clearly erroneous.

We believe that, where a suit is to be tried without a jury, sending a law clerk to gather evidence is so destructive of the appearance of impartiality required of a presiding judge that we must remand this case for an evidentiary hearing to determine the truth of Philadelphia Gear's allegation.

We recognize that not every ex parte communication to the trial court requires reversal. In *United States* v. *Green*, 544 F.2d 138 (3d Cir. 1976), *cert. denied*, 430 U.S. 910 (1977), for example, a trial judge instructed his law clerks to observe a criminal defendant in the courtroom when he was out of the view of the prosecutor, his counsel, the

jury, and the judge. The judge had ruled defendant competent to stand trial at a pre-trial hearing, but had received reports during the course of the trial that the defendant was not communicating with his attorney or assisting in the presentation of his defense. The trial court advised defense counsel that the defendant's behavior was being monitored, and no objection was raised. At a post-trial competency hearing, the law clerks testified to their observations, suggesting that the defendant was faking his purported mental impairment. The trial judge again ruled that the defendant was mentally competent. The Third Circuit held that the defendant had not been denied his right to a fair trial. In so holding, the court placed special emphasis on the facts that defense counsel had notice of the procedure being used and failed to object, that the clerks had placed their observations on the record, and that the defense had been offered an opportunity to cross-examine them and to offer additional evidence.

Some conduct is so inimical to the fair and impartial administration of justice, however, that the presumption of prejudice arising therefrom is conclusive and requires an automatic reversal. This principle was recently recognized by this Court in *Standard Alliance Industries, Inc.* v. *Black Clawson Co.*, 587 F.2d 813 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979). There, the trial judge sent his law clerk to interview two jurors to determine whether they had been improperly contacted by defense counsel after rendering a verdict in the liability phase of a civil trial. Judge Keith, writing for the Court, there said: "Ex parte contact between a judge and jury raises a presumption of reversible error." *Id.* at 828. Noting that "the length and nature of the law clerk's contact with the jury was unknown [because] [n]o record was kept and no notice was given to the parties," the Court held that the presumption of prejudice could not be rebutted. *Id.* at 828-829.

In a case analogous to the one before us, the Fifth Circuit reversed a jury verdict for the plaintiff where the trial court permitted its law clerk to testify to what he saw at a curiosity-inspired private view of the scene of a slip-and-fall injury. *Kennedy* v. *Great Atlantic & Pacific Tea Co.*, 551 F.2d 593 (5th Cir. 1977). The injury had occurred at the defendant's store on a rainy morning, and the clerk visited the store after a rain storm at which time, according to his testimony, he observed a puddle of water on the floor. The trial judge repeatedly cautioned the jury not to attach any special significance to his law clerk's testimony. The Court of Appeals, nevertheless, held that it was required to vacate the judgment in the exercise of its supervisory power. The court first observed that it was the "duty [of the law clerk] as much as that of the trial judge to avoid any contacts outside the record that might effect the outcome of the litigation." *Id.* at 596. Reasoning that the finder of fact must be " 'free from external causes tending to disturb the exercise of deliberate and unbiased judgment,' " and that the courts must not tolerate " 'any ground of suspicion that the administration of justice has been interfered with,' " quoting *Mattox* v. *United States*, 146 U.S. 140, 149 (1892), the appeals court concluded that the potential for prejudice resulting from the identification of the witness with the trial court was so great that the verdict could not be permited to stand. 551 F.2d at 598.

We have found no case that addresses the precise issue before us. The principle that reverberates throughout the decisions discussed above, however, is that a judge may not direct his law clerk to do that which is prohibited to the judge. Unquestionably, it would be impermissible for a trial judge to deliberately set about gathering facts outside the record of a bench trial over which he was to preside.

The duty to avoid off-the-record contacts that might influence the outcome of the litigation is expressed in Canon 3 (A) (4) of the Code of Judicial Conduct for United States Judges, which provides: "A judge should neither initiate nor consider ex parte . . . communications concerning a pending or impending proceeding. . . ." Canon 3 (C) (1) (a) goes even farther and imposes a duty upon a judge to disqualify himself where his "impartiality might reasonably be questioned" because of his "personal knowledge of disputed evidentiary facts concerning the proceedings." The problem attendant to a judge having personal knowledge of the facts is that he may thereby be transformed into a witness for one party. Where the trial is to a jury, explicit rules provide some protection. If a judge is to preside, he may not testify. Rule 605, Fed. R. Civ. P.[1] If he is to testify, he may not preside. 28 U.S.C. § 445.[2] A rule that merely prohibits a presiding judge from testifying in open court, however, does not insure that the fact finder will be "free from external causes tending to disturb the exercise of deliberate and unbiased judgment," *Mattox* v. *United States, supra,* where the trial is to the bench. Whether, in a bench trial, a judge can avoid an involvement destructive of impartiality where he has personal knowledge of material facts in dispute is a question that cannot be answered satisfactorily, *see* Advisory Committee's Notes, Rule 605, Fed. R. Civ. P., and, therefore, a judge should rescue himself in such circumstances.

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[1] Rule 605, Fed. R. Civ. P., provides: "The judge presiding at trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

[2] Title 28 U.S.C. § 455 provides, in part: "Any . . . judge of the United States shall disqualify himself in any case in which he . . . is or has been a material witness. . . ."

*See, e.g., Roberson v. United States,* 249 F.2d 737, 741 (5th Cir. 1957), *cert. denied,* 356 U.S. 919 (1958).

The present state of the record raises many questions that must be answered prior to any further consideration of the other issues raised on this appeal. We do not know whether the clerk actually visited plaintiff's plant, though Price Brothers Company does not deny the allegations in its brief. Most importantly, we do not know whether the trip, if made, was at the direction of the trial judge; nor does the record disclose the nature of any conversations the law clerk may have had with plaintiff's employees, the observations he may have made while at the plant, or whether any of the information obtained on the trip was reported to the judge. It further remains to be discovered at what point defense counsel learned of the trip, and from what source; and whether defense counsel expressly or tacitly approved of the procedure.

We remand for an evidentiary hearing and report. We reserve jurisdiction to consider and pass upon the report, and to consider all further issues raised on this appeal, if it is found that the allegation of impropriety is unfounded.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

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Civil Action File No. C-3-75-85

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PRICE BROTHERS COMPANY

vs.

PHILADELPHIA GEAR CORPORATION

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## JUDGMENT

(Filed October 25, 1977)

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff has established entitlement to damages by a preponderance of the evidence in the amount of $125,864.15.

Dated at Dayton, Ohio, this 25th day of October, 1977.

JOHN D. LYTER
Clerk of Court

/s/ BARBARA VINGANT
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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Civil No. C-3-75-85

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PRICE BROTHERS COMPANY,

Plaintiff,

v.

PHILADELPHIA GEAR CORPORATION,

Defendant.

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# FINDINGS OF FACT OPINION, AND CONCLUSIONS OF LAW

(Filed October 25, 1977)

This matter is before the Court following trial and presentation of witnesses and exhibits and upon the report, testimony and cross examination of a court appointed witness pursuant to Rule 706 of the Federal Rules of Evidence.

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith its findings of fact, opinion and conclusions of law.

## I. FINDINGS OF FACT

### A. Liability

1. Plaintiff Price Brothers Company is a Michigan Corporation with its principal place of business in Dayton,

Ohio. The corporation is a manufacturer of concrete pipe. Defendant Philadelphia Gear Corporation is a Pennsylvania corporation with its principal place of business in King of Prussia, Pennsylvania. Philadelphia Gear Corporation manufactures industrial gears, clutches and power transmission equipment.

2. This litigation concerns a malfunctioning of machinery produced by defendant and used in concrete pipe wrapping operations. Defendant's product is part of what is described as a horizontal differential pipe wrapping machine.

3. Reinforced concrete pipe constitutes one of Price Brothers' principal product lines. Plaintiff built their first pipe wrapping machine in 1955 and has since participated in the design of seven other machines. Four of these machines are presently in operation in Price Brothers plants in Hattiesburg, Mississippi, Dayton, Ohio, and Beacon, New York. It is the machine installed in the Beacon facility that is the subject of this litigation.

4. Production of reinforced concrete pipe begins with a steel cylinder, with a layer of concrete on the inside, or with layers of concrete on the outside and inside. To produce a pipe sufficiently strong to withstand the high internal and external pressures to which it may be subjected, the cylinder must be externally "prestressed" by wrapping it helically with wire up to ¼" in diameter. Pressure capacity of the pipe may be increased by reducing "pitch", i.e., space between helical loops of wire, and by greater wire tension during wrapping.

5. Three essential components are necessary for a successful pipe wrapping machine: a drive component, a tension component, and a component for controlling pitch. Both the drive component and the tension component are

connected to a shaft which rotates the pipe. Tension may be produced by means of a snubbing wheel combined with a differential gear, by a dead-weight system, or by other means, each intended to create the appropriate amount of drag on the wire. The total amount of wire tension may range up to 9,000 pounds. The power component or drive component also runs the carriage which feeds the wire onto the pipe as the pipe is rotated.

In order to meet the rigid standards for wire tension and pressure capacity Price Brothers production standards allow a deviation of only 100 pounds tension plus or minus from customer specifications.

By its very nature, a pipe wrapping machine is a complex combination of such components which must operate smoothly and synchronously. Only two such components were supplied by defendant.

6. In early 1969 Price Brothers sought entry into the concrete pipe market in the Eastern United States. Unable to compete because of substantial shipping costs from the Middle West, plaintiff proposed to build a plant in Beacon, New York. Plaintiff intended to assemble a pipe wrapping machine similar to the others operated by them.

7. The contemplated design produced tension by a differential gear. This plan was abandoned in late 1969 or early 1970 after plaintiff became aware of an article published by defendant in the December 15, 1969, edition of *Products Engineering* describing one of its products with the trade name of Synchrodrive. The article described a hydroviscous variable speed drive employing a clutch pack with "almost limitless life" which transmitted torque through the "shearing . . . of oil between two surfaces rotating in opposite directions. . . ." These constant slip clutches, known as "synchrodrives" were represented as cap-

able of 1. "precise infinitely variable speed"; 2. "precise torque control"; and 3. "extremely fast" response time. (Plaintiff's Exhibit 18).

8. Discussions between the parties regarding use of the Philadelphia Gear Synchrodrive occurred in early 1970. On March 27, 1970, Robert C. Matson, Applications Engineer and Sales Manager for the Synchrotorque Division of Philadelphia Gear Corporation, wrote a letter to Donald G. Wysong confirming these discussions (Plaintiff's Exhibit 3). He also sent some sales literature and manuals which more fully described the Philadelphia Gear synchrodrives (Plaintiff's Exhibit 19).

9. In March and April of 1970 further discussions were had with Fremont & Lewis, Inc., local sales representative for defendant. Fremont & Lewis informed plaintiff that the model "H-29 Synchrodrive" could be used in place of the differential gear in the tension component of the pipe wrapping machine. By the end of April, Price Brothers had made the decision to purchase the H-29.

10. Fremont & Lewis also sought to sell plaintiff a synchrodrive for the drive component. Price Brothers had intended to use an "Eddy Current" drive for the drive component. Price Brothers required a drive which could slow the pipe rotation to zero for long periods of time, while at the same time maintaining tension on the wire. The drive was also required to produce smooth starts and stops for uniform tension and a minimum of breaks in the wire. Fremont and Lewis, Inc., as well as Philadelphia Gear Corporation in their sales literature, (Exhibits 19 and 20), gave assurances that the Model H-12 synchrodrive with an internal brake could perform as well as the Eddy Current drive and at a lower price. By June of 1970, the decision was made to purchase a Model H-12 for this purpose. An

acknowledgment of the purchase order was sent by Philadelphia Gear on July 21, 1970 (Plaintiff's Exhibit 24 and Defendant's Exhibit TT).

11. During the time period in question, defendant was in the early stages of synchrodrive development. John K. Liu was hired in October of 1968 to develop and head the Synchrotorque Division. The first prototype of a Philadelphia Gear synchrodrive was assembled in early 1969. (Liu Deposition at 38). The first prototype of a Model H-12 was built in early 1970 (Liu Deposition at 39). None of the machines listed in Brochure No. CB-1 (Plaintiff's Exhibit 19) had been built prior to its publication (Liu Deposition at 80-81). The early prototypes went through a minimum of formal testing and apparently no test results for these models are available. Both the H-12 with an internal brake and the H-29 sold to Price Brothers were the first of their kind to be built by Philadelphia Gear (Liu Deposition at 186, 199).

Plaintiff was never advised that the products purchased were still in a development stage.

12. The delivery date of November 15, 1970, was not met. Despite repeated requests for delivery both units (H-12 and H-29) were not received in Dayton, Ohio, until July 11, 1971. The H-12 unit was recalled by defendant for revision in October, 1971, and redelivered in November, 1971.

Neither the H-12, nor the H-29 ever performed as represented.

13. The entire machine including units H-12 and H-29 were shipped to Beacon, New York in April of 1972 and installed in May of 1972. The Beacon plant was a new installation with new employees intended to produce a new product.

14. In December of 1975 the tension and drive components were completely revamped. The H-29 was left in the system but is no longer used to produce holdback tension. Tension is now produced by a dead weight system. The H-12 was taken out of the drive component and replaced with an Eddy Current drive. The horizontal differential pipe wrapping machine is presently functioning as it was designed to function.

**B. Damages**

15. In October of 1971 the plaintiff entered into a contract with Fitzpatrick and Schiavone to supply "84 pipe for a job known as the "Nassau County Outfall Sewer". (Plaintiff's Exhibit 107) As of June 1, 1972, 302 pieces of pipe were on the job, all supplied from plaintiff's plant in Pontiac, Michigan. (Plaintiff's Exhibit 107A) While that exhibit indicates only 217 pieces of pipe on the job as of that date, it will be assumed that the others were in transit. According to Exhibit 107A there was an excess of 85 pieces of pipe on the job site on July 1, 1972. The total shipped from Pontiac after that date is 116, for a deficiency of 31 pipes shipped because of the inability of the Beacon plant to perform. The cost of shipping a pipe from Pontiac, Michigan to the job site amounted to $463.00.

16. In March of 1972 plaintiff entered into a contract with Verona Contracting Corporation for the delivery of approximately 33,000 linear feet of 48" prestressed concrete pipe for use on the Monmouth County Bayshore Outfall Sewer. Plaintiff's Exhibit 113B indicates that from April, 1972 through February, 1973, a total of 1,683 pieces of pipe were delivered to the job site. Of these 1,683 pieces of pipe, 826 were shipped from plaintiff's Dayton plant and 857 were shipped from Beacon.

Exhibit 113B seems to indicate that 288 pieces were required on the job site by June 1, 1972. No portion of those 288 pieces of pipe could be supplied from Beacon. From June 1, 1972 through the balance of the contract 538 pieces were supplied from Dayton. Of those 538, 258 were supplied in the month of June. Subsequent to July 1, 1972 245 pieces of pipe were shipped from Dayton in order to meet the contract.

According to Plaintiff's Exhibit 113I the shipping differential between Dayton to the job site and Beacon to the job site averaged $107.00 per pipe.

17. In order to meet its contract requirements on the "84 pipe required for the Nassau County job, plaintiff was required to purchase 110 pieces from the Interpace Company, one of its competitors. Plaintiff paid Interpace the sum of $274,768.00 (Plaintiff's Exhibit 107B). For that same pipe plaintiff charged the sum of $211,782.00. This represents a net loss on the transaction of $62,986.00. While the evidence is conflicting as to the appropriate percentage of sales that should represent profit, the weight of the evidence convinces this Court that dealing with a new plant and with new machinery, a figure of 7% of sales should be used.

## II. OPINION

The resolution of this matter requires selection from opinions of experts, all of whom possessed impeccable credentials, intimate knowledge of a highly technical subject, and an advocate's zeal for their respective positions. Only their conclusions differed but that difference was total.

One significant fact has emerged from all of the testimony and it stands unrefuted. The description by defendant of its product referred to in Finding of Fact 7

was a knowing misrepresentation of such product's capabilities. The defendant knew and concealed from the plaintiff that its product was in a developmental stage and had never been used in a production line. Defendant's assurances of the performance of its product were likewise misrepresentations and based upon hope alone.

Plaintiff is therefore entitled to damages, which must, however, be limited by realities of industrial production. An assumption that the Beacon plant could be on line June 1, 1972 appears to be unrealistic. Whatever might be the difficulties of a new piece of machinery in an established plant, or a standard pieces of machinery in a new plant, such assumptions are simply invalid in the case of a new plant with new personnel and a new machine. Some period of testing in Beacon must be assumed as a normal requirement.

From a consideration of all of the evidence presented, it seems unreasonable to this Court to assume that less than six weeks would be necessary before the deficiencies in the operation of the pipe wrapping machine ceased being the normal malfunction of a newly-installed piece of machinery and became instead inherent deficiencies of a misrepresented product.

The evidence on the critical question of when the Beacon plant reasonably could be expected to be on line is quite confusing. Each side, when it has suited its purpose, has claimed the machine to be simple or complex, off-the-shelf or newly designed, familiar to the plaintiff or unfamiliar to the plaintiff, operative or inoperative. Neither side presented evidence of the normal "break-in" time of a new complex machine in a new installation.

Based upon the classical standard of "more likely to be true than not true", the Court determines that plaintiff

has failed to establish by a preponderance of the evidence that the Beacon plant reasonably could be producing pipe on June 1, 1972. Plaintiff has established that absent malfunctioning of the pipe wrapping machine, pipe produced at Beacon could be delivered to the job site subsequent to July 1, 1972. It is at the chronological date of July 1, 1972 when plaintiff's damages commence and it is on this basis that damages for loss of business profits and excess expenses should be awarded.

## III. Damages

### 1. Direct Damages

By reason of defendant's misrepresentation (Findings of Fact 11 and 12), the Court finds that the plaintiff is entitled to recover the purchase price of the H-12 ($5,880.00), the price of the air brake which replaced the internal brake of the H-12 ($469.10), the price of the replacement clutch plates ($497.05), and the price of the disc pack for H-12 space and the actuator guide disc ($640.00). Plaintiff is not entitled to the cost of the motor pump combination for the H-12 and H-29.

### 2. Incidental Damages

**A. Shipping costs for Nassau County job**

31 sections of Pipe x $463.00 = $14,353.00
(Finding of Fact 15)

**B. Shipping Costs for Monmouth County Job**

245 Sections of pipe x 107 = $26,215
(Finding of Fact 16)

C. Purchase of pipe from competitor

| | |
|---|---|
| Purchase of 110 Sections x $2,497.89 = | $ 274,768.00 |
| Sale of 110 Sections x $1,925.29 = | 211,782.00 |
| Loss | 62,986 |
| Profit of 7% | 14,824 |
| | $ 77,810.00 |

(Finding of Fact 17)

Recapitulation:

| | |
|---|---|
| Direct Damages | $ 7,486.15 |
| Nassau County Job | 14,353.00 |
| Monmouth County Job | 26,215.00 |
| Loss of Pipe Purchase | 77,810.00 |
| | $ 125,864.15 |

## IV. CONCLUSIONS OF LAW

A. This Court has jurisdiction over this matter in accordance with 28 U.S.C. § 1332 (a).

B. Plaintiff has established by a preponderance of the evidence that defendant misrepresented the capabilities and level of development of both the H-29 and the H-12, and thereby breached both express and implied warranties of merchantability and fitness for a particular purpose.

C. The disclaimer of warranties found on the back of defendant's acknowledgment of plaintiff's order (Exhibit TT) is totally ineffectual as a limitation on defendant's liability under Ohio Rev. Code ¶ 1302.29. *Compare Travel-*

*er's Indemnity Co.* v. *Evans Pipe Company*, 432 F.2d 211 (6th Cir. 1970) *with Country Clubs, Inc.* v. *Allis-Chalmers Manufacturing Co.*, 430 F.2d 1394 (6th Cir. 1970). *See* Ohio Rev. Code ¶ 1302.10.

D. The plaintiff has established entitlement to damages by a preponderance of the evidence in the amount of $125,-864.15.

LET JUDGMENT ISSUE IN ACCORDANCE WITH THE FOREGOING.

/s/ CARL B. RUBIN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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NOS. 78-3088 and 78-3089

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PRICE BROTHERS COMPANY

Plaintiff-Appellee Cross-Appellant

v.

PHILADELPHIA GEAR CORPORATION

Defendant-Appellant Cross-Appellee

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**ORDER**

(Filed June 18, 1981)

Before: KEITH and MERRITT, Circuit Judges, and PECK, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by plaintiff-appellee, cross-appellant, the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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NO. 78-3088, 78-3089

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PRICE BROTHERS COMPANY

Plaintiff-Appellee, Cross-Appellant,

vs.

PHILADELPHIA GEAR CORPORATION

Defendant-Appellant, Cross-Appellee.

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## NOTICE OF APPEAL

(Received September 3, 1981)

Please take notice that Price Brothers Company, Plaintiff-Appellee, Cross-Appellant appeals the DECISION & JUDGMENT rendered on the 15th day of May, 1981. The PETITION FOR REHEARING was denied on the 18th day of June, 1981.

This appeal is being taken pursuant to 28 U.S.C. § 1254.

/s/ NEIL F. FREUND

YOUNG & ALEXANDER CO., L.P.A.
367 W. Second Street
Suite 100
Dayton, Ohio 45402

Attorney for Plaintiff-Appellee, Cross-Appellant

## APPENDIX B

## RULES AND STATUTES INVOLVED

### OHIO REVISED CODE

**§ 1302.26 (UCC 2-313) Express warranties by affirmation, promise, description, sample.**

(A) Express warranties by the seller are created as follows:

(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(B) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

**Official Comment**

To consolidate and systematize basic principles with the result that:

1. "Express" warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. "Implied" warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated.

This section reverts to the older case law insofar as the warranties of description and sample are designated "express" rather than "implied."

2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Chapter are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of RC § 1302.31 [UCC 2-318] on third party beneficiaries expressly recognize this case law develment within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is

made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

4. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under RC § 1302.29 [UCC 2-316].

This is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

5. Division (A) (2) makes specific some of the principles set forth above when a description of the goods is given by the seller.

A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly

or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

6. The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a "sample" actually drawn from the bulk of goods which is the subject matter of the sale, and a "model" which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to "suggest" or to "be" the character of the subject matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject

matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model.

7. The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (RC § 1302.12 [UCC 2-209]).

8. Concerning affirmations of value or a seller's opinion or commendation under division (B), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary. The provisions of division (B) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

**§ 1302.27 (UCC 2-314) Implied warranty; merchantability; usage of trade.**

(A) Unless excluded or modified as provided in section 1302.29 of the Revised Code, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(B) Goods to be merchantable must be at least such as:

(1) pass without objection in the trade under the contract description; and

(2) in the case of fungible goods are of fair average quality within the description; and

(3) are fit for the ordinary purposes for which such goods are used; and

(4) run, within the variations permitted by the agreement, of even kind, quality and quantity, within each unit and among all units involved; and

(5) are adequately contained, packaged, and labeled as the agreement may require; and

(6) conform to the promises or affirmations of fact made on the container or label if any.

(C) Unless excluded or modified as provided in section 1302.29 of the Revised Code, other implied warranties may arise from course of dealing or usage of trade.

**Official Comment**

This section, drawn in view of the steadily developing case law on the subject, is intended to make it clear that:

1. The seller's obligation applies to present sales as well as to contracts to sell subject to the effects of any examination of specific goods. (RC § 1302.29 (B) [UCC 2-316 (2)]). Also, the warranty of merchantability applies to sales for use as well as to sales for resale.

2. The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade

must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. The responsibility imposed rests on any merchant-seller, and the absence of the words "grower or manufacturer or not" which appeared in Section 15 (2) of the Uniform Sales Act does not restrict the applicability of this section.

3. A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description. A person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

4. Although a seller may not be a "merchant" as to the goods in question, if he states generally that they are "guaranteed" the provisions of this section may furnish a guide to the content of the resulting express warranty. This has particular significance in the ease of second-hand sales, and has further significance in limiting the effect of fine-print disclaimer clauses where their effect would be inconsistent with large-print assertions of "guarantee."

5. The second sentence of division (A) covers the warranty with respect to food and drink. Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. Cases to the contrary are rejected.

The principal warranty is that stated in divisions (A) and (B) (3) of this section.

6. Division (B) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is "must be at least such as . . .," and the intention is to leave open other possible attributes of merchantability.

7. Paragraphs (1) and (2) of division (B) are to be read together. Both refer, as indicated above, to the standards of that line of the trade which fits the transaction and the seller's business. "Fair average" is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass "without objection." Of course a fair percentage of the least is permissible but the goods are not "fair average" if they are all of the least or worst quality possible under the description. In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.

8. Fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section and is covered in paragraph (3). As stated above, merchantability is also a part of the obligation owing to the purchaser for use. Correspondingly, protection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be "honestly" resalable in the normal course of business because they are what they purport to be.

9. Paragraph (4) on evenness of kind, quality and quantity follows case law. But precautionary language has been added as a reminder of the frequent usages of trade which permit substantial variations both with and without an allowance or an obligation to replace the varying units.

10. Paragraph (5) applies only where the nature of the goods and of the transaction require a certain type of container, package or label. Paragraph (6) applies, on the other hand, wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labelling or the representation. This follows from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the package or container. No problem of extra consideration arises in this connection since, under this Chapter, an obligation is imposed by the original contract not to deliver mislabeled articles, and the obligation is imposed where mercantile good faith so requires and without reference to the doctrine of consideration.

11. Exclusion or modification of the warranty of merchantability, or of any part of it, is dealt with in the section to which the text of the present section makes explicit precautionary references. That section must be read with particular reference to its division (D) on limitation of remedies. The warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.

12. Division (C) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties and thus sub-

ject to the exclusion or modification under RC § 1302.29 [UCC 2-316]. A typical instance would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog or blooded bull.

13. In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

**§ 1302.28 (UCC 2-315) Implied warranty; fitness for particular purpose.**

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under section 1302.29 of the Revised Code an implied warranty that the goods shall be fit for such purpose.

**Official Comment**

1. Whether or not this warranty arises in any individual case is basically a question of fact to be determined by

the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller.

2. A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are cutomarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.

The provisions of this Chapter on the cumulation and conflict of express and implied warranties must be considered on the question of inconsistency between or among warranties. In such a case any question of fact as to which warranty was intended by the parties to apply must be resolved in favor of the warranty of fitness for particular purpose as against all other warranties except where the buyer has taken upon himself the responsibility of furnishing the technical specifications.

3. In connection with the warranty of fitness for a particular purpose the provisions of this Chapter on the allocation or division of risks are particularly applicable in any transaction in which the purpose for which the

goods are to be used combines requirements both as to the quality of the goods themselves and compliance with certain laws or regulations. How the risks are divided is a question of fact to be determined, where not expressly contained in the agreement, from the circumstances of contracting, usage of trade, course of performance and the like, matters which may constitute the "otherwise agreement" of the parties by which they may divide the risk or burden.

4 The absence from this section of the language used in the Uniform Sales Act in referring to the seller, "whether he be the grower or manufacturer or not," is not intended to impose any requirement that the seller be a grower or manufacturer. Although normally the warranty will arise only where the seller is a merchant with the appropriate "skill or judgment," it can arise as to non-merchants where this is justified by the particular circumstances.

5. The elimination of the "patent or other trade name" exception constitutes the major extension of the warranty of fitness which has been made by the cases and continued in this Chapter. Under the present section the existence of a patent or other trade name and the designation of the article by that name, or indeed in any other definite manner, is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but it is not of itself decisive of the issue. If the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or trade name is not sufficient to indicate nonreliance if the article has been recommended by the seller as adequate for the buyer's purposes.

6. The specific reference forward in the present section

to the following section on exclusion or modification of warranties is to call attention to the possibility of eliminating the warranty in any given case. However it must be noted that under the following section the warranty of fitness for a particular purpose must be excluded or modified by a conspicuous writing.

**§ 1302.30 (UCC 2-317) Cumulation and conflict of warranties express or implied.**

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(A) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(B) A sample from an existing bulk displaces inconsistent general language of description.

(C) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

**Official Comment**

1. The present [former sections 14, 15 and 16 of the Uniform Sales Act] section rests on the basic policy of this Chapter that no warranty is created except by some conduct (either affirmative action or failure to disclose) on the part of the seller. Therefore, all warranties are made cumulative unless this construction of the contract is impossible or unreasonable.

This Chapter thus follows the general policy of the Uniform Sales Act except that in case of the sale of an article by its patent or trade name the elimination of the warranty of fitness depends solely on whether the buyer has relied on the seller's skill and judgment; the use of the patent or trade name is but one factor in making this determination.

2. The rules of this section are designed to aid in determining the intention of the parties as to which of inconsistent warranties which have arisen from circumstances of their transaction shall prevail. These rules of intention are to be applied only where factors making for an equitable estoppel of the seller do not exist and where he has in perfect good faith made warranties which later turn out to be inconsistent. To the extent that the seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense.

3. The rules in divisions (A), (B) and (C) are designed to ascertain the intention of the parties by reference to the factor which probably claimed the attention of the parties in the first instance. These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable.

## FEDERAL RULES OF CIVIL PROCEDURE

**Rule 52. Findings by the Court.**

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

# Opposition

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No. ———

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

PRICE BROTHERS COMPANY,
Petitioner,

v.

PHILADELPHIA GEAR CORPORATION,
Respondent.

**On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1.

Did the United States Court of Appeals for the Sixth Circuit correctly apply the appropriate standard of review when it determined that certain factual findings of the United States District Court for the Southern District of Ohio were clearly erroneous?

2.

Did the United States Court of Appeals for the Sixth Circuit correctly apply substantive Ohio law?

## LIST OF PARTIES

Pursuant to U.S. Sup. Ct. Rule 28.1, 28 U.S.C.A., counsel for Respondent certifies that the following constitutes a list naming all parent companies, subsidiaries and affiliates of the Respondent.

1. Philadelphia Gear Corporation, King of Prussia, Pennsylvania.

2. Limitorque Corporation, Lynchburg, Virginia.

3. American Manufacturing Corporation, King of Prussia, Pennsylvania.

4. Philadelphia Gear Mexicana, Mexico City, Mexico.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

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No. ————

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PRICE BROTHERS COMPANY,
Petitioner,

v.

PHILADELPHIA GEAR CORPORATION,
Respondent.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent prays that the Petition for a Writ of Certiorari to review the May 15, 1981, judgment of the United States Court of Appeals for the Sixth Circuit be denied.

## OPINIONS BELOW

Order of the United States Court of Appeals for the Sixth Circuit denying rehearing, June 18, 1981, and as printed in APPENDIX A of Petitioner's Brief.

Decision of the United States Court of Appeals, for the Sixth Circuit of May 15, 1981. Officially cited as *Price*

*Brothers Company* v. *Philadelphia Gear Corporation*, 649 F.2d 416 (1981), and as printed in APPENDIX A.

The Decision of the United States Court of Appeals, for the Sixth Circuit of September 5, 1980. Officially cited as *Price Brothers Company* v. *Philadelphia Gear Corporation*, 629 F.2d 444 (1980), and as printed in APPENDIX A.

Unreported Findings of Fact and Conclusions of Law and Judgment of the United States District Court, Southern District of Ohio, dated October 25, 1977 and as printed in APPENDIX A.

## RULES AND STATUTES INVOLVED

RULE 52, Federal Rules of Civil Procedure (Appendix B)

Ohio Revised Code, SECTION 1302.26 (UCC 2-313), Express warranties by affirmation, promise, description, sample. (APPENDIX B as printed in Petitioner's Brief)

Ohio Revised Code, SECTION 1302.27 (UCC 2-314), Implied warranty; merchantability; usage of trade. (APPENDIX B)

Ohio Revised Code, SECTION 1302.28 (UCC 2-315) Implied warranty; fitness for particular purpose. (APPENDIX B)

## STATEMENT OF THE CASE

Being apparently dissatisfied with the May 15, 1981 ruling of the United States Court of Appeals for the Sixth Circuit (hereinafter the "Court of Appeals") that commonly accepted engineering principles and custom do indeed apply in the Southern District of Ohio, Petitioner, Price Brothers Company (hereinafter sometimes referred to as "Price Brothers") has now undertaken one final, albeit curious, attempt to convince a judicial body that the designer of a new, complex, untried, experimental machine should be able to pass ultimate responsibility off onto the shoulders of one of its component suppliers, when the overall operation of the designer's experimental mechanical system does not perform as intended.

Not surprisingly, this somewhat irregular proposition found little in the way of a sympathetic response from the Court of Appeals. But what must continue to cause surprise, however, is Petitioner's continued advancement of such a bankrupt theory even to the point where an attempt to obtain jurisdiction from the highest court in the land is based upon such a flimsy, suspect foundation.

Price Brothers, a Michigan corporation with its principal offices in Dayton, Ohio, is a manufacturer of prestressed (reinforced) concrete pipe. These pipes, which can range in size from a few feet in diameter to eight or nine feet in width, are used for a myriad of purposes, including the transmission of fluids under pressure where pipe must resist substantial internal pressure and the transmission of fluids through areas under water where external pressure is great. As part of its manufacturing process, Price Brothers wraps wire around each piece of pipe in order to reinforce the pipe's resistance to both internal and external pressures. Once wrapped, the pipes are able

to withstand far greater force than if they remained mere unstressed concrete cylinders.

Having developed and utilized a well established manufacturing method and having incorporated this machine design into "pipe-wrapping machines" as early as 1955, Price Brothers had, by 1969, acquired and earned an expertise in this particular engineering field. In 1969, Price Brothers once again set out to build a pipe-wrapping machine but this time utilizing a method different than that which it had refined and perfected over the past fifteen years.

This time, Price Brothers' engineers determined to design and adopt an entirely new process which would incorporate new components and subsystems into it, including a wholly new and untried method of maintaining and controlling tension on the stressing wire as the pipe was wrapped. Apparently seeking a cheaper way to manufacture its pre-stressed pipe, Price Brothers discarded the tried and true method which it had evolved over the previous decade and one half and adopted a new concept and design worked out by its own design engineers. To implement this change, Price Brothers investigated and selected for purchase numerous new components from separate manufacturers. Included in this procurement was the acquisition of two industrial clutch components (hydroviscous drives) from Respondent, Philadelphia Gear Corporation (hereinafter sometimes referred to as "Philadelphia Gear") for the purpose of transmitting a rotating drive force (torque) from the power source into the overall wrapping system.

Specifically described in Price Brothers' own purchase order, the Philadelphia Gear components were purchased and later delivered during 1971 at a time compatible with Price Brothers' other component procurement schedules

and after delay of Price Brothers' own choosing, spring of 1972 saw this new experimental pipe-wrapping machine put "on-line."

Despite its 15 year success record with the operation of earlier-designed pipe-wrapping machines, Price Brothers encountered difficulty with its new concept. But having failed to follow accepted engineering principles relating to the utilization of preliminary testing through systems analysis processes, Price Brothers should not have been too surprised when its new system was unable to meld together and combine the various products and components of numerous manufacturers into its control systems, tensioning systems, speed systems and feedback systems so as to smoothly coordinate the components' efforts into the production of pre-stressed concrete pipe.

In layman's terms, Price Brothers could not get its new machine to work and, refusing to accept the fact that its design was faulty, looked around for someone to blame. Faced with a poorly-functioning machine and unwilling to admit that it was Price Brothers' own failure in design and application which had created the problem, Price Brothers sought to shift responsibility for its own errors over onto the shoulders of one of the component manufacturers. On April 11, 1975, Price Brothers filed suit against Philadelphia Gear for damages in excess of $400,000.

The matter proceeded to trial before the United States District Court for the Southern District of Ohio (hereinafter the "Trial Court") and after a lengthy hearing and the utilization by the Trial Court of Dr. James Thorpe, its own independent expert (who found that the Philadelphia Gear components performed as described and that the fault lay in Price Brothers' "abdication of design responsibility" and their being "remiss in design procedures") all parties were advised by letter dated December 16, 1976

that tentative Findings of Fact and Conclusions of Law had been prepared and that the Trial Court had concluded in substance that Philadelphia Gear was not liable for any material misrepresentation or breach of warranty.

Thereafter, however, in one of the more interesting turnabouts encountered in this case, the Trial Court on October 25, 1977 completely ignored its own previous tentative Findings of Fact and Conclusions of Law, rejected the findings of its own Court-appointed engineering expert, rendered a Judgment, Findings of Fact, Opinion, and Conclusions of Law in favor of Price Brothers and awarded damages of $125,864.15.

The obvious confusion and inability of the Trial Court to make up its mind was not a characteristic shared by the Court of Appeals, however. On appeal, the Court, on May 15, 1981, unanimously determined that the findings of the Trial Court were "clearly erroneous", determined from a review of the record as a whole that no express or implied warranties were breached, reversed and entered judgment for Respondent, Philadelphia Gear. Thereafter a Motion for Rehearing was denied.

## SUMMARY OF ARGUMENT

A. A review of Price Brothers' Petition reveals that there is no special or important reason set forth justifying the grant by this Court of a Writ of Certiorari.

B. Applying the standards established by this Court the Court of Appeals correctly applied the "clearly erroneous" rule in reversing the Trial Court's Findings of Fact.

C. Determining from a review of the record as a whole and all relevant circumstances surrounding the transaction that Price Brothers was in the best position to determine through preliminary testing and systems analysis whether its experimental pipe-wrapping machine would work, the Court of Appeals was correct in finding that Philadelphia Gear breached no express warranties.

D. Far from encouraging falsehoods or predatory behavior, the decision of the Court of Appeals encourages merchants who possess superior expertise to utilize their knowledge to conduct preliminary tests and systems analysis on their experimental designs so as to insure that ultimate performance will be as anticipated.

E. The Court of Appeals was correct in its determination that the degree of specificity in Price Brothers' own purchase order and the expertise of its own engineers was inconsistent with any finding that Petitioner relied on Philadelphia Gear's skill or judgment to create an implied warranty of fitness. Equally correct was the Court of Appeals' conclusion that total compliance by the Philadelphia Gear components with the purchase order specifications evidenced compliance with any implied warranties of merchantability.

## ARGUMENT

### A. THE PETITIONER HAS SET FORTH NO SPECIAL OR IMPORTANT REASON JUSTIFYING A GRANT OF CERTIORARI.

The most cursory review of Price Brothers' Petition For Certiorari quickly leads to the conclusion that this matter, though of course important to the parties involved, can be of only passing interest, if that, to this Court. Involving no major factual issue of great national import or interest; having no special or important characteristic that sets it apart from countless similar lawsuits; containing no determination or resolution of a federal question at odds with any of the other Circuits, there is nothing in this case which would justify a favorable exercise of this Court's judicial discretion. U.S. Sup. Ct. Rule 17.1, 28 U.S.C.A.; *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1954).

The within action involves the sale of clutch components to a company manufacturing a pipe-wrapping machine, an alleged breach of warranty under the Ohio Uniform Commercial Code, and a claim for damages resulting therefrom. Other than the fact that Petitioner is dissatisfied with the outcome whereby judgment was entered for Respondent, there is no other reason, legitimate or otherwise, to justify the presentation of the within Petition to this Court.

### B. THE COURT OF APPEALS CORRECTLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD IN SETTING ASIDE THE TRIAL COURT'S FINDINGS OF FACT.

Contrary to Petitioner's argument, the Court of Appeals clearly recognized the standards incumbent upon it and

correctly applied these standards in reviewing and setting aside the Trial Court's factual findings. Petitioner's protestations to the contrary notwithstanding, the Court of Appeals was operating wholly within permissible bounds when in a unanimous decision it applied the requirements of Rule 52, Federal Rules of Civil Procedure, as discussed by this Court in *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948). There this Court stated at p. 395 that a reviewing court:

> "[M]ay reverse findings of fact by a trial court where 'clearly erroneous.'
>
> * * *
>
> A finding is 'clearly erroneous' when *although there is evidence to support it,* the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis supplied)

Here the Court of Appeals was left with the "definite and firm conviction that a mistake [had] been committed" by the Trial Court, and to rectify that mistake, correctly reversed the decision of the Trial Court and entered judgment for Respondent. Such a procedure has been deemed correct in countless other cases. It was correct here. *See, Lewis* v. *City of Grand Rapids,* 356 F. 2d 276 (6th Cir. 1966); *Ferrero* v. *United States,* 603 F. 2d 510, 512 (5th Cir. 1979); *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 534 at n. 8 (1979) reh. denied 444 U.S. 877 (1979).

## C. THE COURT OF APPEALS CORRECTLY DETERMINED THAT EXPRESS WARRANTIES WERE NOT BREACHED.

Petitioner at pp. 11-20 of its Brief has expended a great deal of time and energy in an effort to manufacture a fictional straw man in the eyes of this Court, at which target its shots can be aimed. Petitioner argues that the Court of Appeals has misapplied the Ohio law of sales and created a so-called "reliance" requirement in cases of express warranty where such requirement did not heretofore exist. Petitioner argues that the Court of Appeals has determined that buyers must in fact rely upon the affirmations and promises of a seller before express warranties can be created. Ohio Rev. Code Ann. § 1302.26 (Page); U.C.C. § 2-313. As are the other arguments made by Petitioner, this one too is without merit or substance.

In the within case, the Court of Appeals was careful to distinguish situations where a buyer's reliance was a critical factor in the so-called "basis of the bargain" and differentiate between cases where pre-contract statements were bona-fide express warranties and those cases where such preliminary statements were merely deemed to be a seller's "puffing." As was recognized by the Court of Appeals, if the statements were factual affirmations and so perceived by the buyer, the factor of reliance was not always necessary to make such statements express warranties. But if all of the surrounding circumstances established such statements as "puffing," then liability would lie if and only if the legitimate, justified reliance by the buyer upon the statements moved them out of the realm of "puffing" and into the purview of affirmations of fact and express warranties. *See, Land* v. *Roper Corporation,* 531 F. 2d 445, 448 (10th Cir. 1975) and *Borowing* v. *Chicago Mastic Company,* 367 F. 2d 751, 759 (7th Cir. 1966).

Viewing the record as a whole, the Court of Appeals rightfully viewed "the circumstances surrounding the transaction, the reasonableness of the buyer in believing the seller and the reliance placed on the seller's statements by the buyer" in determining whether any preliminary statements should have rightfully been deemed a basis of the bargain or as mere "puffing" where buyer's justified reliance would be needed to establish liability. (Appendix A at p. 9a); 1 A. Squillante & J. Fonseca, The Law of Modern Commercial Practices 236, § 3:40 (revised ed. 1980). Considering these items and the record as a whole, the Court of Appeals unanimously determined that the contents of the advertising brochures, to wit, preliminary statements intended for unspecified general audiences, could only be deemed in the nature of "puffing" when received and read by engineering representatives of a buyer whose expertise in the design of pipe-wrapping machines far overshadowed any knowledge possessed by seller.

Since "reliance" could not or should not have existed on the part of Price Brothers, and since reliance was the critical element in cases of this nature, the Court of Appeals was clearly justified in concluding that no recovery was available under the doctrine of express warranty and that determinations to the contrary by the Trial Court were clearly erroneous. *See, Royal Business Machines, Inc.* v. *Lorraine Corp.*, 633 F. 2d 34 (7th Cir. 1980).

As was stated by the Court of Appeals (Appendix A at p. 11a):

> "Where both parties are merchants who are on equal footing with respect to the subject matter of their transactions, and their sales agreement is reduced to a writing that specifies technical requirements for the goods sold, it would stretch reason beyond its limits to find that the buyer relied on verbal assurances by

salesmen and writings intended for unspecified general audiences as a part of the basis of the bargain."

## D. CONTRARY TO THE ACCUSATIONS OF PETITIONER THE DECISION BELOW DOES NOT ENCOURAGE OR CONDONE FALSEHOODS BUT RATHER EMPHASIZES THE RESPONSIBILITIES OF MERCHANTS OF EQUAL OR SUPERIOR EXPERTISE TO PERFORM THEIR OWN PRELIMINARY TESTS AND ANALYSIS TO INSURE THAT THEIR OWN NEW DESIGNS WILL PERFORM AS ANTICIPATED.

Wholly contrary to Petitioner's Cassandra-like prophecy of national disaster in the area of commercial sales should the Court of Appeals decision in the within case go unchallenged, Respondent merely acknowledges the wholly-justified reasoning of the Court in once again emphasizing that merchants must be responsible for the pre-testing and systems analysis of the overall operation of their own experimental, untried machines, especially where their component suppliers do not have experience with anything other than the operation of their own components. Merchants as buyers must utilize the knowledge they possess to review, analyze and insure their own interests. *Royal Business Machines, Inc., supra* at p. 44; 1 R. Anderson, Uniform Commercial Code § 2-313:18 (2d ed. 1970).

To accuse the Court of Appeals of encouraging falsehood, as does the Petitioner, is an unjustified slander and a serious misreading of its decision. The Court of Appeals never finds misrepresentation or falsehood on the part of Philadelphia Gear. To the contrary (Appendix A at p. 10a), the Court specifically notes that Petitioner itself has

made "no contention on this appeal that Philadelphia Gear's components failed to meet the specifications provided by Price Brothers' purchase order."

Rather, the Court merely noted that *if* Philadelphia Gear was in error in its assurances then Price Brothers' experts should have recognized such error as either "puffing" or the like and utilized their far greater level of expertise to make an independent assessment of the adequacy of the proposed components for the tasks assigned to them. (Appendix A at p. 10a). Such a conclusion is a far cry from the ill-considered accusation by Petitioner that the Court of Appeals encourages the preying upon unwary buyers by unscrupulous sellers.

## E. THE COURT OF APPEALS APPLIED THE CORRECT STANDARDS GOVERNING THE UTILIZATION OF IMPLIED WARRANTIES UNDER THE OHIO UNIFORM COMMERCIAL CODE.

Petitioner seems to have advanced little in support of its argument that the Court of Appeals "misconstrued" the law of Ohio insofar as it relates to the creation and application of implied warranties. Except for some conclusory accusations that the Court used principles that were "not the law of Ohio," little attention is given by Petitioner to showing just why that is the case.

The Court of Appeals on the other hand devotes a great deal of space in its opinion to this subject and illustrates quite clearly that it did in fact correctly utilize applicable standards.

As was noted by the Court of Appeals, implied warranties of fitness for a particular purpose depend upon the establishment of two general facts. *First*, the seller must be

aware at the time of contracting of the particular purpose for which buyer intends to use the goods. *Second,* the buyer must rely on the seller's skill and judgment to select or furnish goods suitable for that particular purpose. Ohio Rev. Code Ann. § 1302.28 (Page); U.C.C. § 2-315; *Vetovitz Bros., Inc.* v. *Kenny Construction Company,* 60 Ohio App. 2d 331, 334, 379 N.E. 2d 412, 414 (Medina Co. 1978) motion to certify record overruled — Ohio St. 2d. — (June 30, 1978).

Applying the above discussed "clearly erroneous" standard, the Court of Appeals noted the "degree of specificity of Price Brothers' purchase order and Price Brothers' own undisputed high degree of knowledge regarding the mechanical requirements of its own pipe wrapping machine" (Appendix A at p. 11a) and rejected any finding that Price Brothers as buyer relied upon component selection by Philadelphia Gear or that any implied warranty of fitness was created. *See, Standard Packing Corporation* v. *Continental Distilling Corporation,* 378 F. 2d 505 (3d Cir. 1967); *Steel Sanitary Co.* v. *Pangborn Corp.,* 38 Ohio App. 65; 175 N.E. 2d 615 (Stark Co. 1930).

In addition to its consideration of implied warranties of fitness for a particular purpose, the Court of Appeals also devoted a portion of its opinion to a consideration and rejection of the Trial Court's finding of a breach of an implied warranty of merchantability. Noting that such an implied warranty is breached when goods fail to be of a quality comparable to that generally acceptable in the trade for goods of that kind [Ohio Rev. Code Ann. § 1302.27 (Page); U.C.C. § 2-314; U.C.C. § 2-314 (Official Comment 2)]; the Court of Appeals determined from the record as a whole that; *First,* there was no contention on the appeal by Price Brothers that Philadelphia Gear's components failed to meet the specifications provided by Price

Brothers' purchase order (Appendix A at p. 10a), (in fact everything in the record as well as the conclusion of the Trial Court's own appointed expert established compliance with the specifications) and *Second*, the Trial Court did not and could not make a determination as to what, if any, standards of performance existed for goods of that kind. (Appendix A at p. 13a). *See*, 3 A. Squillante & J. Fonseca, Williston On Sales 81, § 18-9 (4th ed. 1974); *Axion Corporation* v. *G.D.C. Leasing Corporation*, 269 N.E. 2d 664 (Mass. 1971); *Royal Business Machines, supra*, at p. 46.

In recognition of the relatively equal skill and knowledge of the parties to this transaction, and in light of semi-experimental aspects of Price Brothers' newly-designed pipe-wrapping machine, the Court of Appeals found no breach of implied warranties of merchantability or fitness for a particular purpose. *See, Stiefel Feed Company* v. *Aerovent Fan Company*, 148 F. Supp. 894, 898 (S.D. Ohio 1956) aff'd 238 F. 2d 859 (6th Cir. 1956), and *Seitz* v. *Brewers' Refrigerating Machine Co.*, 141 U.S. 510 (1891) wherein this Court stated at p. 518:

> "[T]hat where a known, described and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose still, if the known described and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer."

Clearly there was no breach of any implied warranties by Philadelphia Gear and the Court of Appeal's determination of this was wholly appropriate. Petitioner's arguments to the contrary are unfounded and should be rejected.

## CONCLUSION

For the reasons set forth herein, this Court should deny the Petition for Writ of Certiorari.

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